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No. 717.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

SYDNEY J. WOOD, doing business under the firm name and style of 53RD STREET SUBWAY LIQUOR STORE,

Petitioner,

against

JOHN M. O'GRADY, individually and as President, and "JAMES DOE", name fictitious, true name unknown to plaintiff, individually and as Treasurer of the Wine and Liquor Store Employees Union, Local 122, A. F. of L., WINE AND LIQUOR STORE EMPLOYEES UNION, LOCAL 122, A. F. of L., and "JOHN DOE", "RICHARD ROE", "MICHAEL DOE", *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Opinions Below.

The opinion of the New York Supreme Court, Special Term (Pet. 25-26) is not officially reported but is reported at 23 Labor Cases ¶67,696. The opinion of the Appellate Division (Pet. 26-29) is reported at 283 App. Div. 83. The opinions of the Court of Appeals of the State of New York (Pet. 29-49) are reported at 307 N. Y. 532.

Jurisdiction.

Though Petitioner invokes the jurisdiction of this Court under 28 U. S. C., Section 1257 (3), in our view there is no jurisdiction because the asserted federal questions were never properly raised in the state court proceedings below.

Question Presented.

We believe the question asserted by Petitioner is not properly before the Court both because it was not raised in the courts below and because in any event the underlying factual assumptions are not borne out either by the record or the findings below.

The question which Petitioner seeks to raise is whether a state, consistently with the due process and equal protection clauses of the Constitution, may refuse to enjoin peaceful organizational picketing of several years' duration which, it is asserted, may ultimately result in putting the employer out of business.

Statute Involved.

The pertinent provisions of §876-a of the Civil Practice Act of the State of New York are set out in the Appendix, *infra,* pp. 11-15.

Statement.

Petitioner's statement throughout departs in major respects from the facts as found by the Court of Appeals, omits facts deemed of decisive importance by that court, and recites as "facts" allegations either rejected by that court or not contained in the record at all.

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The facts, as found by the Court of Appeals and as shown by the evidence, may be summarized as follows:[1]

The petitioning Employer employs among others three sales clerks in his liquor store in the City of New York. The respondent Union is the collective bargaining representative for liquor store clerks in New York (31; 90, 106-107, 303). In October 1951, the Union began organizational efforts among the Employer's sales clerks (31; 274-275). At no time did the Union claim to represent the clerks or demand that the Employer sign a contract (31, 33, 34; 46-47, 97, 112-113, 124-127, 251, 277, 282, 292).

The Employer's response to the Union's organizing efforts was to threaten to fire his workers if they joined the Union (31, 32, 36; 78, 243-244, 280, 281, 294, 299).

The Union thereupon placed one or two pickets in front of the store on October 20, 1951, carrying a truthful picket sign as follows (31; 96, 224-226):

> "The employees of this store are non-union. Please do not patronize this non-union store. We are members of the American Federation of Labor, Local 122 of A. F. L."

After the picketing commenced, the Employer continued to coerce his employees to keep them from joining the Union; among other things, he threatened to close his store if they became Union members (32; 243-244).

The Employer also filed a representation petition with the New York State Labor Relations Board, which the Board dismissed because it found that the Union was simply engaged in organizational activity among the employees, had never claimed to represent them, and therefore no ques-

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[1] In the following statement, the references preceding the semicolons are to the opinion of the Court of Appeals as reprinted at pp. 29-38 of the Petition, and the succeeding references are to the supporting evidence.

tion of representation existed (33; 43-51). A subsequent injunction action brought by the Employer to restrain all picketing was likewise dismissed by the Supreme Court at Special Term (33; 30 LRRM 2090).

The Union continued its picketing in front of the Employer's store. Admittedly the picketing has at all times been entirely peaceful (31; 79-80). In March 1953 the Union also briefly picketed in front of a warehouse where the Employer had stored liquor consigned to him, but within a few days and long before the instant action was commenced this picketing was voluntarily discontinued and never resumed (32-33; 207-211, 256-257, 261). This short-lived picketing in front of the warehouse, the Court of Appeals later held, afforded "no evidentiary basis for restraining by injunctive means the picketing being peacefully conducted in front of the employer's retail store" (33).

The instant action was commenced in May 1953, about a year and a half after the store picketing started, to restrain all picketing in front of the store. The complaint was based on the theory that the Union was unlawfully seeking to compel the Employer to violate the State Labor Relations Act, and asserted that the controversy did not constitute a "labor dispute" within the meaning of §876-a of the Civil Practice Act, the "little Norris-La Guardia Act" (29; 26). No claim was made, however, that a denial of the injunction would violate the Employer's rights under the Federal Constitution.

In this action, the Employer made many allegations about the purpose and effect of the picketing which were ultimately rejected by the Court of Appeals but which are nevertheless repeated as "facts" by the Employer in his Petition to this Court.

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Contrary to Petitioner's statement to this Court (Pet. 5), the picketing did not cut off all deliveries of supplies; rather, as the Court of Appeals pointed out, the Employer obtained all the supplies he needed so that at all times his shelves were "loaded" (32, 37; 131, 140).

Contrary to Petitioner's repeated statements to this Court (Pet. 3, 5, 8, 10, 12, 13, 16, 17), there is absolutely no showing that there was any loss in patronage or business profits whatsoever or that the business was reduced to "a shadow of its former operation" (Pet. 13); rather, as the Court of Appeals pointed out, the Employer did not even attempt to make such a showing (32, 37; 323).

Contrary to Petitioner's statement to this Court (Pet. 4, 12, 14), the employees have not shown hostility to the Union; rather, as the Court of Appeals pointed out, certain employees indicated a favorable attitude but refrained from joining the Union for fear that the Employer would make good his threat to dismiss any worker who did so (32; 78, 244-248, 294, 299).

Contrary to Petitioner's repeated statements to this Court that the purpose of the picketing was to force the Employer either to violate the New York State Labor Relations Act or to go out of business (Pet. 3, 6, 8, 10, 16-17), the Court of Appeals found that the very same allegations were "contrary to the overwhelming weight of evidence" (34) and that the peaceful picketing was for "avowedly organizational purposes" and was "being conducted in the furtherance of union interests in a statutory labor dispute" (35, 36; 254, 255).

The trial court dismissed the Employer's complaint, holding that the picketing was for organizational purposes and was lawful both under New York common law and under §876-a of the Civil Practice Act (25-26). The Appellate Division reversed (26-29), but was in turn reversed by the

Court of Appeals which reinstated the judgment of the trial court and dismissed the complaint (29-38, 51-53). The Court of Appeals held that the public policy of the State, as expressed in §876-a of the Civil Practice Act, *infra*, pp. 11-15, forbade the restraint of peaceful organizational picketing and that the legislature, in permitting such picketing, had not prescribed a time limit on such lawful picketing so long as it was being lawfully conducted in the furtherance of Union interests in a statutory labor dispute (35-36, 37-38).

An application by the Employer for reargument[2] was denied by the Court of Appeals on January 13, 1955 (308 N. Y. .....).

Throughout the litigation up to this point, Petitioner had at no stage raised any federal question nor had the Court of Appeals decided any. Apparently realizing that this was a fatal bar to a writ of certiorari from this Court, Petitioner on February 11, 1955, addressed a further application to the Court of Appeals "for amendment of remittitur to show federal questions, or, in the alternative, for reargument to permit more explicit presentation of federal questions." Petitioner stated his purpose was to "make it appear to the Supreme Court of the United States upon application for a writ of certiorari whether or not a federal question was necessarily decided . . ." (Cover and Page 2 of Motion). This application was likewise denied by the Court of Appeals without opinion on March 10, 1955 (308 N. Y. .....).

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[2] In obvious disregard of the proprieties, this application contained affidavits executed by employees subsequent to the Court of Appeals' decision, purporting to state their unwillingness to join the Union. In its Petition to this Court, Petitioner relies on these affidavits although they are clearly not part of the record (12, 14).

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Argument.

1. Petitioner cannot invoke this Court's jurisdiction under 28 U. S. C., Section 1257(3) because he failed to raise or preserve any federal question in the state courts, nor did the state courts decide any federal question.

Petitioner in no form raised a federal question until after the Court of Appeals had handed down its judgment and had denied without opinion a first motion for reargument. Not until more than three and a half months after the Court of Appeals had decided the case did Petitioner contend for the first time in a second motion to amend remittitur or in the alternative for reargument that federal questions were "implicit" throughout the proceedings, although at the same time conceding that his briefs and points had nowhere referred to such questions. Petitioner's Brief to Court of Appeals in Support of Motion, February 11, 1955, p. 4. This second motion was denied by the Court of Appeals without opinion.

It is clear that an attempt to assign new errors in a petition for rehearing in a state court, which is overruled without an opinion passing on asserted federal questions, cannot import such questions into the record to sustain a writ of certiorari. *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 112, 118; *Herndon* v. *Georgia,* 295 U. S. 441, 443, rehearing denied 296 U. S. 661; *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 128. Moreover, the attempt to import such new issues was in violation of the rules of practice of the state court. Rules of the Court of Appeals of the State of New York (Gilbert-Bliss ed., 1954 Suppl.), Rule VII, pp. 3-4.

In his Petition here, repeating a like claim made to the Court of Appeals in his second motion there, Petitioner asserts that federal questions were mentioned by him in

the oral argument before the Court of Appeals (Pet. 3). To the best recollection of counsel no such questions were orally presented. In any event, the conclusive answer is that the Court of Appeals denied the application to amend the remittitur to show that such questions were presented and passed on. And beyond that, it is well settled that arguments of counsel in state courts are not part of the record and cannot be used to establish that a federal question was raised. *Zadig* v. *Baldwin,* 166 U. S. 485, 488; *Sayward* v. *Denny,* 158 U. S. 180, 183; *Live Oak Assn.* v. *R. R. Comm.,* 269 U. S. 354, 356-359.

Since no federal questions were presented to the court below nor passed on, this Court will not consider such questions on certiorari. *C. I. O.* v. *McAdory,* 325 U. S. 472, 477.

2. Even had federal questions been preserved in the state courts, Petitioner presents no substantial federal question warranting review by this Court.

As posed by Petitioner, the question is whether a state may constitutionally refuse to enjoin peaceful organizational picketing which has gone on for a number of years and which allegedly is destroying the Employer's business. But as we have shown (*supra,* p. 5), the latter factual assumption is directly contrary to the finding of the Court of Appeals and to the record. Thus the question raised by Petitioner is purely a hypothetical one, not involved in the instant case.

Furthermore, even were the question genuinely here, it does not warrant review. It has been established since 1937 that a state may, consistently with the Federal Constitution, enact and apply an anti-injunction act proscribing injunctions against picketing except in limited circumstances. *Senn* v. *Tile Layers Union,* 301 U. S. 468; *cf. Lauf*

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v. *E. G. Shinner & Co.*, 303 U. S. 323, 330. It is late in the day again to raise that question.

A state has the "power . . . to set the limits of permissible contest open to industrial combatants." *Thornhill* v. *Alabama*, 310 U. S. 88, 104. No doubt organizational picketing of a non-union shop may sometimes hurt an employer's business. On the other hand, inability to picket the non-union shop may result in depressing the wage and other union standards in the shops already organized. *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 208-209; *Teamsters Union* v. *Hanke*, 339 U. S. 470, 475. A state must necessarily weigh and balance these conflicting "hurts" when it decides to draw the line so as to permit organizational picketing. This Court has repeatedly refused to assess the wisdom of state policy proscribing picketing where the state's action is not arbitrary. *Teamsters Union* v. *Hanke*, 339 U. S. 470; *Hughes* v. *Superior Court*, 339 U. S. 460; *Building Service Union* v. *Gazzam*, 339 U. S. 532; *Giboney* v. *Empire Storage Company*, 336 U. S. 490; *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722. Certainly this Court will not apply a different rule where the state's decision is to allow the picketing —and especially so when one remembers that the free-speech ingredient of picketing makes it constitutionally less doubtful to allow than to forbid picketing.

As this Court has indicated, there might be a constitutional question whether a state is entitled to *forbid* organizational picketing. *Building Service Union* v. *Gazzam*, 339 U. S. 532, 539-540; *Plumbers Union* v. *Graham*, 345 U. S. 192, 200-201. But this is the polar opposite of Petitioner's claim that a state is constitutionally forbidden to *allow* organizational picketing. That contention is clearly without merit and raises no substantial federal question.

Conclusion.

No federal questions were preserved or passed on below. In any event no substantial federal question is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

JACOB FRIEDBERG,
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Of Counsel:

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Appendix.

CIVIL PRACTICE ACT §876-a. Injunctions issued in labor disputes.

1. No court nor any judge or judges thereof shall have jurisdiction to issue any restraining order or a temporary or permanent injunction in any case involving or growing out of a labor dispute, as hereinafter defined, except after a hearing, and except after findings of all the following facts by the court or judge or judges thereof to be filed in the record of the case:

(a) That unlawful acts have or a breach of any contract not contrary to public policy has been threatened or committed and that such acts or breach will be executed or continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That complainant has no adequate remedy at law;

(e) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection; and

(f) That no item of relief granted prohibits directly or indirectly any person or persons from doing, whether singly or in concert, any of the following acts:

(1) Ceasing or refusing to perform any work or to remain in any relation of employment;

(2) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any agreement, undertaking or promise;

(3) Paying or giving to, or withholding from, any person any strike or unemployment benefits or insurance or other moneys or things of value;

(4) By all lawful means aiding any person who is being proceeded against in, or is prosecuting any action or suit in any court of the United States or of any state;

(5) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, picketing, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace;

(6) Ceasing to patronize or to employ any person or persons;

(7) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

(8) Advising or notifying any person or persons of any intention to do any of the acts heretofore specified;

(9) Agreeing with other persons to do or not to do any of the acts heretofore specified;

(10) Advising, urging or inducing without fraud, violence or threat thereof, others to do the acts heretofore specified;

(11) Doing in concert of any or all of the acts heretofore specified on the ground that the persons engaged therein constitute an unlawful combination or conspiracy or on any other grounds whatsoever.

2. Such hearings shall be held only after a verified complaint and a verified bill of particulars specifying in detail the time, place and the nature of the acts complained of and the names of the persons alleged to have committed the same or participated therein have been served and after due and personal notice, in such manner as the court

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shall direct, has been given to all known persons against whom relief is sought and also to the public officers charged with the duty to protect the complainant's property. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination and testimony in opposition thereto, if offered, and no affidavits shall be received in support of any of the allegations of the complaint.

* * * * * *

4. No injunctive relief shall be granted to any plaintiff who has failed to plead and prove compliance with all obligations imposed by law which are involved in the labor dispute in question, or who has failed to allege and prove that he has made every reasonable effort to settle such dispute either by negotiation or with the aid of any machinery of mediation or voluntary arbitration, provided for by law or contract between the parties.

5. No injunctive relief shall be granted except to prohibit such specific act or acts as may be expressly complained of in the complaint and the bill of particulars filed in such case and expressly included in the findings of fact made and filed by the court. Such injunctive relief shall be binding only upon the parties to the suit, their agents, servants, employees, or those in active concert or participation with them and who shall by personal service or otherwise have received actual notice of the same.

6. No officer or member of any association or organization and no association or organization participating or interested in a labor dispute (as these terms are herein defined) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by the weight of evidence and without the aid of any presumptions of law or fact, of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and

(b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

* * * * * *

8. No permanent injunction shall remain in force for more than six months from the date on which the judgment is signed, provided, however, that the duration of the injunction may be extended for another six months, if after a further hearing initiated and conducted in the same manner as the original hearing the court shall determine that the injunction shall be continued or modified in accordance with the findings of facts on the subsequent hearing.

* * * * * *

10. When used in this section, and for the purpose of this section: (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation, or who are employees of one employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is between one or more employers or associations of employers and one or more employees or associations of employees; between one or more employers or associations of employers and one or more employers or associations of employers; or between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft or occupation in which such dispute occurs, or is a member, officer or agent of any association of employers or employees engaged in such industry, trade, craft or occupation.

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(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee.